Supreme Court, U.S.
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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LEONARD R. KAHN,

Petitioner,

v.

EMERSON ELECTRIC COMPANY, HAZELTINE CORPORATION AND MOTOROLA, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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50 pp

QUESTIONS PRESENTED

This appeal involves the billion dollar AM Stereo radio industry wherein one firm's patented system has gained a monopoly partially by, in 1992, interfering with the petitioner's 1977 contract with a licensing firm charged with licensing his patents worldwide. The alleged monopolist has gained control of the relevant markets in this concentrated market by inducing the key firms to market radios that only receive it's type of signal. However, that type of signal prevents coverage into sparsely populated areas where many people depend on AM radio. The legal issues are:

1) Is §1 of the Sherman Act violated when present and potential competitors of a firm, enjoying a monopoly, contract with that firm to never sue it under any patent that interferes with maintenance of its monopoly in the relevant markets?

2) Did the trial court err in, a) submitting complex issues of law to a jury, such as the antitrust consequences of a contract, and, b) basing its own ruling on a Fed. R. Civ. P. 50(b) motion for judgement as a matter of law on that lay opinion, rather than on its own independent analysis?

In any case, should not this appeal be remanded to the Federal Circuit if the answer to the following question is yes:

3) Is the Due Process Clause of the Fifth Amendment breached when a federal appellate court's rule states that:

> "Cases and controversies will be heard and determined by a panel consisting of an odd number of judges not fewer than three, two of whom may be senior judges of the court."

and one of the three judges assigned to the appeal meets with an accident that proves to be fatal rendering it impossible for her to take any part in the determination of a properly filed appeal but, nevertheless, the panel issues a final decision?

CERTIFICATE OF INTEREST

The undersigned party of record, Leonard R. Kahn, furnishes the following list in compliance with Rule 29.6:

a) Party represented, Leonard R. Kahn

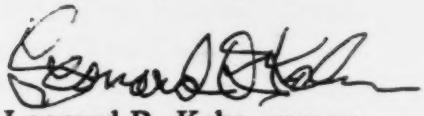
b) Real party of interest, Leonard R. Kahn

c) Leonard R. Kahn does not have any publicly held affiliates.

d) The following law firms have appeared for Leonard R. Kahn in the lower tribunal or are expected to appear for Kahn in this Court:

None

Respectfully submitted,



Leonard R. Kahn, pro se
Plaintiff/Petitioner

Dated: February 6, 1997
New York, New York

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CITATIONS OF OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of New York is unreported, and is reprinted in the appendix at B6.

The Court of Appeals of the Federal Circuit did not issue an opinion, and its judgment is unreported and it is reprinted in the appendix at B1.

JURISDICTION

The Federal Circuit affirmed the Eastern District of New York Court's judgment, without opinion, on August 8, 1996. On August 16, 1996, the appellant filed a request for extension of time to September 5, 1996 to file a request for rehearing which was granted on August 23, 1996. (On August 20, 1996 the appellant filed a motion to vacate based on the use of a two judge panel. On August 29, 1996 the Federal Circuit denied that motion without comment.)

On September 6, 1996 a request for a second extension to September 16, 1996 was filed, and on September 12, 1996 the extension was granted. The petition was filed on September 11, 1996 and on November 12, 1996 the Court denied the petition for rehearing and declined the suggestion for in banc rehearing, again without comment.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provisions, Statutes and Local Court Rules Involved in the Case

Amendment V to United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

SHERMAN ACT Section 1. [15 U.S.C. § 1] Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 dollars if a corporation, or, if any other person, $350,000 dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

28 U.S.C. § 46(b)(c) & (d) state in relevant part:

> (b)...The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a penel.
>
> (c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if it rules so provide),...
>
> (d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitue a quorum.

Second Circuit, Local Rules, PART 1, §0.14 states in relevant part:

> (b) Unless directed otherwise, a panel of the court shall consist of three judges. If a judge of a panel of the court which has heard argument or taken under submission any appeal, petition or motion shall be unable to continue with the consideration of such matter by reason of death, illness, resignation, or incapacity, or shall be relieved of such consideration at the judge's request, the two remaining judges will determine the matter if they are in agreement and neither requests the designation of a third judge.

Sixth Circuit, Local Rules, Rule 3(a) states in relevant part:

> Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court en banc is ordered as provided by Rule 35 of the Federal Rules of Appellate Procedure.

Federal Circuit, Local Rules, 47.2(a), Panels, states:

> Cases and controversies will be heard and determined by a panel consisting of an odd number of judges not fewer than three, two of whom may be senior judges of the court. A panel of more than three judges may be provided when warranted; appeals in cases from the Court of International Trade decided by a three-judge court pursuant to 28 U.S.C. §255 will ordinarily be referred to a panel of five judges.

Fed. R. Civ. P. 50(b) states in relevant part:

> (b) Renewing Motion for Judgment After Trial;...The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment...In ruling on a renewed motion, the court may: ...
> (C) direct entry of judgment as a matter of law...

A CONCISE STATEMENT OF THE CASE

Procedural History and Background of the Case

On June 30, 1992 Plaintiff/Petitioner Leonard R. Kahn ("Kahn")[1], acting pro se, filed a Complaint, in the U.S. District Court of the Eastern District of New York, charging Defendant Hazeltine with breach of contract and Defendant Emerson Electric with tortious interference and included other New York State claims. The Complaint was then amended three times, adding a number of counts and adding Motorola as the third defendant.

Out of the Third Amended Complaint's thirteen claims, eleven survived a fully briefed Rule 12(b) motion to dismiss. Of the surviving claims, only Breach of Contract against Hazeltine, Tortious Interference against Emerson and Motorola, Antitrust against Emerson and Motorola, and a second Antitrust count against Motorola, went to the jury.

On May 26, 1995, the jury ruled in favor of the Defendants on all counts. The Court refused to permit the jury to hear claims of patent code violation by Motorola, breach of fiduciary duties and conversion of funds against Hazeltine.

The Trial Court's November 26, 1995 dismissal of Kahn's Fed. R. Civ. P. 50(b) Motion and its prior refusal to grant a Rule 56 Motion for Summary Judgment are the

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[1]The petitioner for "brevity" (per Rule 14(4)) often refers herein to himself as "Kahn." He is uncomfortable in doing this, but notes his four letter name fulfills the brevity requirement.

original basis of this appeal.

Only the following three counts were appealed to the Federal Circuit in the expectation that by so restricting the appeal, the Federal Circuit would reverse the trial court rather than sending the entire case back for a brand new trial on the merits:

1) Breach of Contract against Hazeltine,
2) Interference with Contract against Motorola and Emerson,
3) Violation of the Sherman Act by Emerson and Motorola.

The Court of Appeals for the Federal Circuit affirmed. However, the affirmation without opinion noted the fact that "Senior Judge Nies took no part in the disposition of this appeal." On August 20, 1996 Kahn filed a motion to vacate based on the use of a two judge panel, but on August 29, 1996 the Federal Circuit denied that motion without comment. Accordingly, this Petition raises, as one of three independent issues, a Due Process question concerning the procedure of using two judge panels by the Federal Circuit whose rules require that its panels consist of "an odd number of judges not fewer than three..."

This suit was brought in response to a contract among all three defendants and also ESCO Electronics, an unnamed co-conspirator which is the holding company that was spun off from Emerson Electric in 1990 and which owned Hazeltine until 1996.[2] Kahn's relationship with Hazeltine started in 1977 when two basic license agreements were

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[2]On information and belief ESCO in July of 1996 sold Hazeltine to GEC-Marconi Electronic Systems Corporation.

signed, (A2334-49 and A2362-76). The first named agreement authorized Hazeltine, (a firm with over 50 years of experience in licensing complex electronic patents), to sublicense all of Kahn's patents in the AM Stereo field which at the time of trial comprised 18 active and expired U.S. patents and their over 200 foreign counterpart patents.

BACKGROUND

Kahn, an individual researcher and consultant, was and is, also president of a small electronics firm, Kahn Communications, Inc., (not party to this suit) entered into an agreement with Defendant Hazeltine in the expectation of the growth of AM Stereo into a multi-billion dollar industry. Certain of Kahn's basic patents were expected, by Kahn and Hazeltine, to end up in control of the AM Stereo industry. Accordingly, Hazeltine and Kahn embarked on a most substantial program based on Kahn's stereo technology. Hazeltine was charged with continuing the patent prosecution of Kahn's existing and future AM Stereo inventions, both domestically and in foreign countries. None of the patents were to be assigned.

Hazeltine debited Kahn's account, as of the trial date, by over two (2) million dollars (A634-637) for costs in obtaining Kahn's foreign and domestic patents. As of that date, Hazeltine had received well over a million dollars in royalties just from the Sony organization, but Kahn has never received any royalties (A636) due to his being debited for the over $2 million dollars in unaudited expenses.(A721, 2383)

Kahn, in the Complaint, alleged that Motorola had conspired to monopolize the AM Stereo industry partially by attacking all receiver manufacturers who wished to manufacture Kahn compatible receivers, including "multi-

mode" receivers[3] which automatically switch between the Kahn and Motorola systems. Such radios were designed for production by Kahn and his licensee, Sony, and also Sanyo, Sansui and Radio Shack/Tandy.(Complaint ¶55)

Kahn, by the mid 1980's was successful in equipping a number of major U.S. and foreign stations, such as WNBC, WABC and WQXR in New York, WMAL in Washington, KSL in Salt Lake City and ABC, NBC and RKO stations at other major cities in the country. Indeed, stations operating with the Kahn/Hazeltine system served the largest number of listeners of any AM Stereo system. On the other hand, Hazeltine was unsuccessful in licensing a single car manufacturer to sell radios that were compatible with the stations Kahn had equipped.

In 1985 Hazeltine provided General Motors with a "reading" of one of Kahn's patents' claims [Claim 53 of U.S. Patent 4,018,994) (the "'994 Patent")] on a receiver that GM was mass producing using Motorola's AM Stereo integrated circuit. A meeting at GM's headquarters in Detroit was arranged for May 15, 1985. GM insisted that Motorola, who would take over defense of all such suits, be present at the meeting.

At the meeting Hazeltine later reported Motorola threatened Hazeltine (Complaint ¶20-25) if it did not, within 30 days, give up its claim against General Motors, it and/or

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[3]Multimode AM Stereo radios are radios that are designed to receive more than one AM stereo system. Kahn developed such receivers that can automatically switch the radios to different modes and granted patent licenses to such firms as Sony. Motorola opposed the sale of such receivers and threatened their manufacturers.(A2381) This situation was the basis of Kahn's Patent Misuse Count that was not permitted to go to the jury.

GM would sue Kahn for (alleged) unfair competition and name Hazeltine as a co-defendant.[4] Without even discussing the problem with Kahn, Hazeltine, on the 29th day, ceded back to Kahn limited rights re the '994 Patent to exclude GM's "Motorola only" radios. (But Hazeltine retained all other rights to the '994 Patent, plus its foreign counterparts, A2384.)

However, during the following three years (1985-1988), Hazeltine supported Kahn in his steps to prepare for the litigation against General Motors (A630-633). This support included, at no cost to Kahn, the services of both Hazeltine's own attorneys as well as two major law firms; one in Chicago, (McDermott, Will & Emery) and one in New York (Brumbaugh, Graves, Donohue & Raymond). On April 29, 1988, Kahn filed a patent infringement suit against General Motors, Kahn v. General Motors, 88 C 2982 (SDNY). This case has a long history and has been bitterly litigated and was the subject of two appeals.[5]

(In April of 1996 Judge Baer of the Southern District of New York conducted an unexpectedly harmonious bench trial wherein Kahn appeared pro se. On January 27, 1997 Judge Baer ruled in GM's favor on noninfringement and found certain claims invalid, based on his interpretation of expert witness testimony. A notice of appeal was filed on

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[4]Hazeltine had almost been bankrupted by the loss of the seminal patent misuse, antitrust suit Zenith v. Hazeltine Research, 395 US 100 (1969), 401 US 321 (1971). Thus it may have been hyper-sensitive to such threats. Despite its threats, GM and Motorola never raised Kahn's alleged unfair competition in any subsequent suit. They never so counterclaimed.

[5]Kahn v. General Motors, 889 F2d 1078, 12 USPQ2d 1997 (Fed. Cir., 1989) and Kahn v. General Motors, 77 F.3d 457, 38 USPQ2d 1063 (Fed. Cir. 1996)[Special Panel]

February 7, 1997. Hazeltine, in accordance with its contract with Motorola, did not provide any legal or engineering witness support during the trial.)

Five years ago (February 3, 1992), Hazeltine's General Counsel visited Kahn at his office and informed him that Hazeltine had signed a contract with Motorola that precluded Hazeltine from further helping him (Kahn) in any way in the Kahn v. General Motors suit. Hazeltine's counsel, Mr. Onders, refused to show Kahn a copy of the agreement Hazeltine made with Motorola.(A2526)

Hazeltine eventually turned over a copy of the actual agreement, (A2350-61) on March 5, 1992, after it was served with a subpoena duces tecum. Finally, after failing to convince Hazeltine to withdraw from its agreement with Motorola, Kahn filed this suit on June 30, 1992.

The Third Amended Complaint claimed federal jurisdiction under; 28 USC 1331, 1337 and 15 USC 1, 2, 15, 26 and 28 USC 1367(a) for supplemental pendent jurisdiction of state claims.

ARGUMENT WHY CERTIORARI SHOULD BE GRANTED

This petition for certiorari is based upon three distinct points; the first being that the Federal Circuit denied the Petitioner his right to due process by violating its own Rule 47.2 and, secondly, that the Federal Circuit permitted to stand an interpretation of the antitrust laws that conflicts with opinions of this Court. And finally, that the trial court submitted questions of law to the jury and also relied on its lay opinion to decide a Fed. R. Civ. P. 50(b) motion for

judgment as a matter of law.

POINT 1

The Federal Circuit entered a judgment, Appendix B1, dated August 8, 1996, which was entered without opinion, affirming the decision of the trial court. The judgment includes the footnote:

> "Senior Judge Nies took no part in the disposition of this appeal."

Actually this appeal was scheduled to be submitted on August 1, 1996 to a "special" panel wherein the Honorable Judge Nies was substituted for one of the original regularly scheduled sitting panel members.[6] Unfortunately, Judge Nies met with a fatal accident on or before 9:02 a.m. in Delaware on August 1, 1996 apparently on her way to the Federal Circuit Court to join the panel in formally accepting the submission of this appeal.[7]

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[6]It is Petitioner's understanding from remarks of Judge Rich at an earlier Federal Circuit session that "special panels" are rarely convened. As there was no oral hearing, and since the Court never issued an opinion, the petitioner can only surmise that due to the unusual nature of the appeal, antitrust and contracts, Judge Nies long experience including her academic background may have been the reason she was requested to serve. If this is true, her unavailability not only denied the appellant the advantages of a third judge, but denied the use of a "special" judge that the original panel decided was required.

[7]To recognize that the distraction that the death of a judge may have caused on this case, consider Judge Rich's discussion of the Federal Circuit, My Favorite Things, IDEA, vol. 35-1, 1994 Franklin Pierce Law Center. He points out that cases are given 10 to 30 minutes panel discussion. Consider what must have happened to that

(continued...)

The Judgment was Based Upon the Actions of An Improperly Constituted Panel and Thus Its Issuance Violates the Court's Own Rules

Under the rules of the Federal Circuit, specifically Rule 47.2, this case was not considered by a properly constituted panel and the judgment is fatally flawed. The first sentence of Federal Circuit Rule 47.2(a) requires that **not fewer than three judges** are to determine cases.

It is noteworthy that this wording is quite different than the wording incorporated in the Sixth Circuit's Rule 3(a) that cases be determined by panels of **not more than three judges**.

On the other hand, the Second Circuit's Rule Part 1 §0.14 (a) states that a panel **shall consist of three judges unless otherwise directed**. The Second Circuit then makes provisions for the situation if the third judge cannot serve after the case has been submitted, a situation that did not occur here.

Actually, the Federal Circuit is apparently unique in that its panels are specially treated in the first sentence of 28 USC 46(c) wherein only the Federal Circuit is authorized to

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[7](...continued)
schedule when the judges were suddenly informed that an esteemed colleague met with a sudden tragic accident on the way to court. Once that vote was taken, and there was an agreement not to even write an opinion, the case was also denied the standard practice described by Judge Rich of careful review of the opinion by the other panel judge(s). And clearly, the **non-opinion** could never be reviewed by the other active Federal Circuit judges to check for precedence establishment. Since all such records are permanently sealed, Kahn can never ascertain what really happened.

use panels of more than three judges.

In any case, the Federal Circuit is bound by its own rules.

This Court Last Reviewed This Issue Over a Half Century Ago

This Court, in a 1941 case, Textile Mills Securities Corp. v. Commissioner of Internal Revenue, 314 U.S 326, provided guidance as to the number of circuit judges to be assigned to various tasks in answering a question regarding such courts sitting en banc. The Court stated that it granted certiorari because of the "public importance" of the problem. id at 327

The present petition, now fifty years later, again raises questions regarding the number of judges that decide federal appeals in what are ordinarily "courts of last resort."[8]

The 1982 Improvement Act that, in part, established the Federal Circuit, in 28 U.S.C. 46(b) clarified panel sizes. Furthermore, it specifically stated that the panels of the Federal Circuit are to consist of not less than three judges.

The Petitioner believes that this Court has, as of this date, never interpreted this section of the 1982 Improvement Act. And with the (possible) exception of the instant case, the Petitioner has been unable to even find a Federal Circuit

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[8]Justice Douglas, speaking for the Court, stated that federal appeal courts are "the courts of last resort in the run of ordinary cases." id at 335.

opinion that treats this specific issue.[9]

Other circuits have considered related situations. For example in the United States v. Glover 731 F.2d 41 (D.C. Cir. 1984) Judge Mivka in a very strongly worded dissent in a summary affirmance of a double jeopardy appeal detailed not only the inappropriateness of two judges considering such motions and only seeking the opinion of the third judge if they disagreed, but the entire question of three judge panels. He also attacked the lack of oral arguments covering such motions and cited a 1983 paper of now Chief Justice Rehnquist in some detail.[10] (The practice of denying requested argument is relevant to the instant appeal.)

Finally Judge Mivka on page 51 quoted from the Senate Report accompanying The Federal Courts Improvement Act of 1982:

> "Current law seems to permit appellate courts to sit in panels of less than three judges, and some courts have used panels of two judges for motions and for disposition of cases in which no oral argument is permitted because the case is classified as insubstantial. In order for the Federal system to preserve both the appearance and the reality of justice, such a practice should not become institutionalized. The disposition of an appeal should be the collective

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[9]Actually, it is unclear what was really considered here as no oral hearing was granted and no opinion was ever issued.

[10]W.Rehnquist, Oral Advocacy: A Disappearing Art October 20, 1983, Brainerd Currie Lecture, Mercer Univ. School of Law.

It is noteworthy that in U.S. v. Delia 925 F.2d 574 (1991), the Second Circuit, in refusing to reschedule a hearing, stated that it believed it was the only circuit that still grants all requests for argument except from incarcerated pro se litigants. At 575

product of at least three minds.
S.Rep. No. 275, 97th Cong., 2d Sess. at 9 (1981)."

In a Second Circuit case, Murray v. National Broadcasting Co. Inc., 35 F.3d 45 (1994) the Court refused to reverse itself and grant a rehearing where a two judge panel heard the oral argument because the third judge recused himself immediately before the hearing started. That Court acknowledged that in the normal course of adjudicating appeals consideration by three judges is preferable, but stated that the Second Circuit's rules are sufficiently "flexible" to permit the use of two judges. Nevertheless, it affirmed that "[w]here a replacement judge can be secured without burdening the court or the parties, it will normally be preferable to do so." (id at 48)

In any case, the Federal Circuit's own rules are clear and after an eleven month appeal process with enormous issues at stake and four lengthy carefully drafted briefs and a 2935 page Appendix, not one written or spoken word of explanation was provided. (At least the Second Circuit permitted oral argument in Murray v. NBC and issued an opinion.) Surely, this presents a significant issue of the Appellate Courts' appearance and reality in providing justice.

Apparently the courts have been willing to sacrifice the occasional appellant whose case may be lost between the cracks in judicial procedures when emergencies strike. But no appellant presenting a nonfrivolous appeal should be forgotten just because a court is busy. Indeed, isn't this the most important time to strictly enforce rules that guarantee due process?

Was Kahn's Pro Se Status a Factor in the Adjudication of this Suit?

The Petitioner recognizes that, as a non-lawyer,[11] pro se party, he might be subject to bias from some jurists and attorneys. But in truth he found that Judge Spatt in pretrial hearings could not have been fairer and more evenhanded in his rulings and demeanor, even though the comparison with the eminent attorneys on the other side must have been overwhelming. This is also true of the clerks and staff of the Federal Circuit. As there never was a word uttered by the panel assigned to his appeal, Kahn has no reason for believing that the appeal was not played out on an even field, except for one matter.

Kahn has had the opportunity and honor of arguing before appellate courts on three separate occasions; twice before the Federal Circuit and once before the Court of Customs and Patent Appeals. All three hearings were most pleasant and successful.

But he noticed that he was the only pro se party scheduled for a hearing on these three separate days. The reason for this is unclear. Surely pro se parties can not be better brief writers than skilled trial lawyers. Manifestly, just plain fairness requires that pro se parties be permitted to engage in the dialogue that oral argument offers to clarify issues and provides some certainty that their (non-frivolous) appeals are "heard." (Certainly, pro se parties should not suffer discrimination in the courts where they seek justice.

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[11]He is however a Professional Engineer and Patent Agent, in both cases registered in 1973 and has "read" law case recommended by his uncle, Herman Kahn, Esq., even before he started his high school education at James Madison High School, Brooklyn, N.Y.

This is especially true in today's $400 per hour fees, where even if you can find competent firms without "conflicts" willing to take a case on contingency, the "out-of-pocket" makes it impossible for all but the wealthiest firms to protect their vital interests.) And even frivolous appeals should merit a short written answer.

The Petitioner is aware of the difficulty of finding Constitutional support for Procedural "Due Process" problems but assuredly this type of situation is serious enough as it was in 1941 in Textile Mills. Clearly this is a difficult matter for understaffed circuit courts to treat, especially since attempts at self discipline pits one judge against another and may cause serious repercussions on a court's collegial spirit. Manifestly, this is a situation where this Court's exercise of its supervisory power is probably the only practical solution.

POINT 2

Remanding this case to the Federal Circuit presents an "unusual" opportunity for that Court to update the boundaries between patent and antitrust law. Thls case is also "unusual" because, as the trial judge pointed out:

> "You have here a very interesting situation. You have a case that is made out essentially by the documents. Very, very unusual." (A966)

Furthermore, the Appellant, in order to avoid a lengthy new trial and further delay, eliminated counts that raised any material questions of fact to make this case at the appellate level even more "unusual" thus further pinpointing issues of law.

Antitrust Count can be Proven by Analayis of a Single Paragraph of Defendants' Contract to Halt Further Competition

Indeed, the main substantive issue can be resolved by considering the following essence of ¶3.2 of the Defendants' 1992 Contract.(A2351 at A2355)

> 3.2 The Second Party [Hazeltine, Emerson Electric and ESCO Electronics]...will not bring,..aid, assist or fund Kahn,...or any other third party in conducting, anywhere in the world, any matter, proceeding, dispute or litigation involving or relating to [infringement by Motorola's AM stereo products..]

This issue was presented to the Federal Circuit as follows:

> Is it a per se violation of the antitrust laws for a firm, dominant in a highly concentrated industry which is covered by patents, to enter into a written agreement which requires its weaker competitor never to assert its present and future relevant patents against the dominant party, especially when two other major technology firms, not presently in said industries, also agree in said agreement never to enforce any patents that they may own at some future time against the dominant firm? (Page 2, Appellant's Brief)

Clearly, this is a straight forward issue of law requiring a ruling further distinguishing patent and antitrust

law.[12]

POINT 3

Another important issue of law was presented to the Federal Circuit: If a contract is carefully drafted and no parol evidence is introduced to modify its terms, should a trial court submit complex legal questions, such as the contract's antitrust consequences, to a jury, and if so, should it use that opinion, in lieu of its own analysis, to decide a Rule 50(b) motion?

This Court in Markman v. Westview Instruments, 116 S.Ct. 1384, 38 USPQ 2d 1461 (1996) based on common sense and early case law provided direct assistance to the Federal Circuit in treating this issue when it stated:

> "[t]he construction of written instruments is one of those things that judges often do and are likely to do better than jurors..." 38 USPQ 2d at 1470.

Thus, the Federal Circuit should have had little trouble in finding that the trial court erred in submitting questions of law to the jury and then basing its own decision

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[12]The Appellant's Brief provided a number of legal citations in support of his antitrust, breach of contract and tortious interference counts. Many of these citations were copied from Judge Spatt's earlier opinion permitting the filing of the Complaint. To comply with the need for brevity, these arguments are not being repeated. However Kahn would like to cite F.T.C. v. Superior Trial Lawyers Assn., 493 US 411 (1990), a boycott of lawyers case. This case repeats its opinion that the "Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." at 423

re Kahn's Fed. R. Civ. 50(b) Motion on that opinion, rather than its own analysis.

Certiorari Should be Granted Because this Appeal is Decisive to the Survival of a Most Important Industry

The AM Stereo industry has yielded billions of dollars of profit to major firms such as General Motors and Chrysler.

AM Stereo is also an industry where not only the instant parties spent decades in expensive research efforts, but similar efforts were made in other American laboratories and in Asia and Europe. It was also an industry that, until the last few years, served a large number of listeners with stereo music.

It is now an industry in desperate trouble. While the parties agree that the industry is dying, the Defendants have argued that this is due to "too much competition" that has caused indecision by broadcasters, but Kahn argued that Motorola's specific system is fatally flawed in that it suffers from "platform motion" (A360-1) and is not viable for many stations. A tape in evidence (A.Exh.7) is available demonstrating this strange motion effect that causes some listeners to become sick to their stomachs and caused a juror to complain about the sound and caused the Trial Judge to say, on the record (A381), that when it is played at full normal volume that the sound "offends" him, "and it must offend some of the jurors." (Yet the Court would not permit Kahn to argue the merits and details of the FCC Opinion. The Trial Court relied on an FCC Report, rather than his own ears.)

Impartial Commentaries that Provide Support for Certiorari on the Basis of Public Interest

To support his assertion that this case is important to the Public, the Petitioner wishes to provide quotes from publications, not in the trial record, to support his plea that this appeal be heard because, unless this Court remands this case to the Federal Circuit, important technology will be permanently lost to the Public. This "superior" technology[13] was, by the terms of Defendants' 1992 Contract to be permanently removed from competition by destroying Kahn's only means to compete in his battle with Motorola, the basic right of patents, the right to exclude others.

---

[13]The New York Times of 12/31/87, under a subtitled section "The Choice of Engineers" stated that "Many radio engineers prefer the Kahn system for what they say is its technological superiority." It quoted WTIC's engineer said it was "technically far superior to [Motorola's] C-Quam" and "sounds better at much, much greater distances." New Cities Broadcasters, with four stations on the Kahn system and two on the Motorola system also stated "Kahn's system was technically better."

Another journal, Spectrum, of the prestigious engineering institute, IEEE, May 1980 issue reported that, after having previously described the then five systems, in a poll of its members, chose the Kahn/Hazeltine system as the most likely to be selected by the FCC. Finally, the U. S. Department of Commerce, in a February 1987 Report comparing the Kahn and Motorola systems disclosed that of the stations that used the two systems Kahn's system was overwhelmingly selected on the basis of "technical superiority" whereas Motorola was selected on the basis of receiver availability. These reports were included as Exhibit L to Kahn's December 5, 1994 Brief opposing Defendants' Motion for Summary Judgment.

Senate Hearings Covering the Competition Between the Parties and Decades of FCC Activity as well as Foreign Studies Prove Significant Public Concern in the Courts Reaching a Correct Final Resolution of this Case

The fact that this case covering almost 30 years of Kahn's work and investment, of course, makes this case of monumental importance to the Petitioner. However, beyond his interest, and even the interests of a billion dollar industry, is the great importance of the correct resolution of this matter to the Public, especially those who live in rural areas of our nation that depend on long distance reception of AM radio.

To confirm the great importance of AM Stereo to the Public one should take note of the 1992 Senate AM Stereo Hearings (A2544-2617) wherein no less than seven (7) U.S. Senators testified and formal statements were made by such people as the FCC Chairman, and broadcast officials in addition to the two competing parties; Motorola and the petitioner here, Kahn, but not Hazeltine.

As a result of an act of Congress, Telecommunication Act of 1992, Section 214, the FCC was directed to choose which of the two systems, Motorola or Kahn, would be the standard. The FCC ignored the recommendation of most of its licensees who filed comments and selected the Motorola system based upon the support of receiver manufacturers and the fact that Motorola enjoyed a de facto monopoly of AM Stereo radios.

But, in its Report & Order, the FCC pointed out that:

> "In this case, Kahn's allegations of anticompetitive activities by Motorola are already the subject of a

separate judicial proceeding. We believe it is inappropriate for the Commission to separately adjudicate these matters, which fall within the expertise of the court." (A2622)

The Commission then pointed out that Kahn could bring an antitrust adjudication to its attention in the future. This is exactly what Kahn plans to do if his appeal is successful.

Conversely, the Trial Court relied upon the FCC Report & Order in his findings re antitrust and the FCC depended on the Court. An example of circular logic.

Certain Substantive Issues Raised Herein go far Beyond AM Stereo and can Impact on the Advancement of Technology in this Scientific Age

This case also underscores one of the most serious threats to our form of government, the problem of huge firms inordinately influencing government policy. Just how far does the right to petition the government go in permitting such firms to control significant actions of key government agencies.

Firms dealing in enormous domestic and international projects that can only succeed with the approval and special favors from not only the U.S. Government but governments all over the world. AM Stereo is one such example. Government influence negates the basic free market premise that open competition will assure survival of the fittest technology.

This situation is not new but during the last few decades with the growth of enormous international firms has

reached the point where the problem cannot be ignored. Just a few examples may suffice in demonstrating the seriousness of the problem of allowing firms to control agencies that were established to regulate them. For example, consider the loss of life caused by improper implementation of air-bags and seat belts. Also consider the haste and poor planning in the FCC's auction of our major resource, the electromagnetic spectrum. Serious matters.

Only the "Third Branch" can protect the public from improper industry control of the government.[14]

Obviously the Petitioner believes this case would be a good starting point as one cannot find a smaller David nor bigger Goliaths.

CONCLUSION

The Petitioner respectfully requests this Honorable Court to remand this appeal to the Federal Circuit for hearing and consideration ab initio by a newly selected three judge panel.

Leonard R. Kahn
Plaintiff, pro se
320 East 42nd Street
Mezzanine West
New York, N.Y. 10017
(212) 983-6765

Dated: February 7, 1997

---

[14]Justice Ginsburg discusses the use and abuse of judicial Third Branch power in Ginsburg, Speaking in a Judicial Voice, NYU L. Rev No. 6, at 1198. Please also see her comments re the efficacy of three judge panels rather than en banc hearings or even larger Supreme Court hearings at page 1193.

APPENDIX

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

96-1149

LEONARD R. KAHN,

Plaintiff-Appellant,

v.

EMERSON ELECTRIC COMPANY, HAZELTINE CORPORATION,

Defendants-Appellees,

and

MOTOROLA, INC.,

Defendant-Appellees.

Judgment

ON APPEAL from the United States District Court for the Eastern District of New York

in CASE NO(S). 92-CV-3063

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

PER CURIAM (MICHEL and BRYSON, Circuit Judges, and NIES, Senior Circuit Judge*/):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED Aug. 08, 1996 s/Francis X. Gindhart pt

Francis X.Gindhart, Clerk

*/ Senior Judge Nies took no part in the disposition of this appeal.

United States Court of Appeals for the Federal Circuit

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and response thereto having been invited by the court and filed by the APPELLEES, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate has already issued.

Circuit Judge SCHALL did not participate in the vote.

FOR THE COURT,

MELVIN L. HALPERN, ACTING CLERK

Dated: November 12, 1996

By_____
Brian P. LeDuc
Associate Chief Deputy Clerk

cc: LEONARD R. KAHN
MICHAEL G. BIGGERS, GARRETT B. JOHNSON

KAHN V EMERSON ELECTRIC, 96-1149
(DCT - 92-CV-3063)

****

Note: Pursuant to Fed. Circ. R. 47.6, this order is not citable as precedent. It is a public record.

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ORIGINAL
UNITED STATES COURT OF APPEALS
For The Federal Circuit

No. 96-1149

LEONARD R. KAHN,

Plaintiff-Appellant,

v.

EMERSON ELECTRIC COMPANY, HAZELTINE CORPORATION and MOTOROLA, INC.

Defendants-Appellees.

Appeal From An Order Of The United States District Court
For The Eastern District Of New York
Judge Arthur D. Spatt

KAHN'S MOTION TO VACATE JUDGMENT AND SUGGESTION FOR IN BANC CONSIDERATION OF THE CASE AB INITIO

Appellant, Leonard R. Kahn ("Kahn"), moves this Court, pursuant to Rule 2 of the Federal Rules of Appellate Procedure to vacate the instant judgment which is based upon

the decision of a two judge panel and which violates this Court's Rule 47.2. It recommends a hearing, ab initio, by this Court sitting in banc.

PRELIMINARY STATEMENT

A Judgment, Attachment 1, dated August 8, 1996, which was entered without opinion, affirmed the decision below. A footnote to the Judgment states that the Honorable "Senior Judge Nies took no part in the disposition of this appeal."

[Stamped] DENIED.

FOR THE COURT

8/29/96 s/Francis X. Gindhart

Date FRANCIS X. GINDHART Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
LEONARD R. KAHN,
Plaintiff, **ORDER**

- against - CV 92-3036 (ADS)

EMERSON ELECTRIC CO., a Missouri 1corporation; HAZELTINE CORPORATION, a Delaware corporation; and MOTOROLA, INC., a Delaware corporation,

Defendants.
----------x

APPEARANCES:

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Terri A. Abruzzo, Esq.

Spatt, District Judge.

Following an eleven day trial, which concluded on May 26, 1995, the jury returned a verdict in favor of the defendants Emerson Electric Co. ("Emerson"), Hazeltine Corporation ("Hazeltine") and Motorola, Inc. The plaintiff Leonard Kahn (the "plaintiff" or "Kahn") now moves the Court for an order, pursuant to Fed. R. Civ. P. 50(b), granting judgment in his favor as a matter of law on his causes of action for breach of contract, tortious interference with contract, anti-trust violations and patent code violations.

DISCUSSION

A motion for judgment as a matter of law, known in the past as a "judgment notwithstanding the verdict" or a "directed verdict" is governed by Rule 50 of the Federal Rules of Civil Procedure, which states in relevant part:

> [i]f during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim... that cannot under the controlling law be maintained without a favorable finding on that issue.

Fed. R. Civ. P. 50(a) (1); see also Zahra Town of Southold, 48 F.3d 674 (2d Cir. 1995). The Second Circuit recently discussed the standard that is to guide the district court in its application of this rule as follows:

> The moving party bears a heavy burden to prevail on its motion for judgment m.o.l. Fed. R. Civ. P. 50(b); Stubbs v. Dudley, 849 F.2d 83, 85 (2d Cir. 1988), cert. denied, 489 U.S. 1034, 109 S.Ct. 1095, 103 L.Ed.2d 230 (1989). In ruling on such a motion, the court must 'consider the evidence in the light most favorable to the [non moving party] and ... give that party the benefit of all reasonable inferences that the jury might have drawn in [its] favor from the evidence.'" Smith v. Lightning Bolt Productions, Inc., 861 F.2d 363, 367 (2d Cir. 1988).

Concerned Area Residents for Environment v. Southview Farm, 34 F.3d 114, 117 (2d Cir. 1994), cert. denied, _ U.S. __, 115 S.Ct. 1793 (1995).

A motion for judgment as a matter of law should be granted following a jury's verdict only upon a finding that

> (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could

> only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [persons] could not arrive at a verdict against [it].

Cruz v. Local Union No. 3, 34 F.3d 1148, 1154 (2d Cir. 1994)

(quoting Bauer v. Raymark Indus., Inc., 849 F.2d 790, 792 (2d Cir. 1988)). In deciding a motion for judgment as a matter of law, the Court must not weigh the evidence, pass on the credibility of witnesses or substitute its judgment of the facts for that of the jury. Weldy v. Piedmont Airlines, Inc., 985 F.2d 57, 59-60 (2d Cir. 1993).

Finally, the Court is mindful that motions pursuant to Rule 50 "should be cautiously and sparingly granted." Id. at 59 (quoting 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2524, at 541-45 (1971)).

A. Breach of Contract

The jury found that the plaintiff did not prove by a preponderance of the evidence that the defendant Hazeltine breached the implied covenant of good faith in the September 27, 1977 Licensing Agreement when it entered into the February 1, 1992 Settlement Agreement. The plaintiff argues that a judgment as a matter of law should be granted in his favor because the jury did not understand the concept of a patent holder's right to exclude or the economics of patents. In the Court's view the jury comprehended the proceedings and responded to the questions on the verdict sheet responsively and with apparent understanding of the legal and factual issues.

Furthermore, the evidence amply supported the jury's verdict. The plain language of the Licensing Agreement, which was Plaintiff's Trial Exhibit 110, granted Hazeltine sole discretion and control in regard to prosecuting or otherwise protecting Kahn's patents. The 1992 Settlement Agreement was signed by Hazeltine, Emerson and Motorola and was entered into evidence at the trial as Plaintiff's Exhibit 111. The Agreement itself states, in Section 4.1, that nothing in the Agreement may interfere with Hazeltine's obligations to Kahn under the licensing agreements.

The jury heard testimony that the Settlement Agreement merely confirmed that Hazeltine would not sue Motorola for infringement of United states Patent No. 4,018,994, because Hazeltine had ceded that patent back to Kahn in 1985 and retained no right to act with regard to that patent. (Trial Transcript [hereinafter "Tr."] 715-16, 1187-93, 1227-28, 1381-82.) There was also testimony by Charles Hansen, former General Counsel of Emerson, and Edward Onders, General Counsel of Hazeltine, that at the time Hazeltine entered into the Settlement Agreement, they each researched the impact of the Agreement on Hazeltine's duties to Kahn and concluded that no breach or violation would occur. (Tr. 1167, 1182-84, 1397, 1421-22.) Furthermore, there was testimony by Julius Adorjan, former present of Emerson, as well as Charles Hansen and Edward Onders that legitimate business reasons supported Hazeltine's decision to enter into the Settlement Agreement. (Tr. 999-1002, 1176-79, 1184-85, 1419.)

Kahn argues that he is entitled to judgment as a matter of law on the breach of contract claim against Hazeltine based on the alleged failure by Hazeltine to fulfill its obligation under Article I of the Licensing Agreement to assist Kahn in obtaining FCC approval of his stereo system.

The record contains testimony that Hazeltine did file comments with the FCC in 1993 urging them not to designate the competing Motorola system as the national standard. Onders of Hazeltine testified that Hazeltine made a strong submission to the FCC opposing the Motorola system. (Tr. 1419-20.) The jury also heard David Hixson of Motorola testify that following the Settlement Agreement there was vigorous competition between Hazeltine, acting on behalf of Kahn, and Motorola to obtain the FCC endorsement. (Tr. 1578-79.) Based on this testimony a reasonable trier of fact could conclude that there was no breach of contract or of the implied covenant of good faith by Hazeltine in allegedly failing to advance Kahn's interests before the FCC.

Kahn's argument that the Court should find a breach on Hazeltine's part because Hazeltine failed to pursue injunctive relief against Motorola based on U.S. Patent No. 4,018,994 is not persuasive. The record supports a finding that Hazeltine ceded all rights to that patent back to Kahn in 1985. (See Defendant's Exhibit I, June 14, 1985 Letter of Stephen P. Ronzheimer, Chairman of Hazeltine Research, Inc. to Mr. Leonard Kahn.)

The Court finds that the evidence was sufficient to support the determination by a reasonable jury that Kahn failed to prove that Hazeltine breached the implied duty of good faith and fair dealing that it owed to Kahn under the Licensing Agreement. Accordingly, Kahn's motion for judgment as a matter of law with regard to the breach of contract claim against Hazeltine is denied.

B. Tortious Interference with Contract

The plaintiff alleged that Emerson and Motorola

intentionally induced Hazeltine to breach the 1977 Licensing Agreement between Kahn and Hazeltine. In determination of a threshold question, the jury found that there was no breach of contract and this Court finds that verdict to be well

supported by the evidence. In the absence of a breach of the underlying contract, Kahn cannot succeed in establishing the elements of tortious interference with contract, as a matter of law. See e.g., Baylis v. Marriott Corp. 906 F.2d 874, 877 (2d Cir. 1990); Jack L. Inselman & Co. v. FNB Financial Co., 41 N.Y. 2d 1078, 395 N.Y.S.2d 347, 349 (1977). Accordingly, Kahn's motion for judgment as a matter of law on his cause of action for tortious interference with contract against the defendants Emerson and Motorola is denied.

C. Antitrust claims

i. conspiracy to restrain trade

As to the claim that Emerson and Motorola violated Section One of the Sherman Antitrust Act, the jury found that Kahn did not prove that either defendant conspired to restrain trade in one or more of the relevant markets in the United States. Kahn moves to set aside that verdict and grant judgment in his favor as a matter o law on these causes of action.

In this regard, Kahn argues that the relevant market in this case is the AM stereo market. However, the jury heard evidence that both the FM and AM radio markets compete for listeners. (Tr. 354, 745, 1324.) Although Kahn's expert, Dr. Abbott rendered an opinion that there was a separate AM stereo market, Kahn himself admits that the jury heard conflicting expert testimony. Of course, the jury could believe or disbelieve either party's experts.

The defendant's expert, Dr. Carlton, testified that it was his view that the Settlement Agreement had no anticompetitive effect or impact. (Tr. 1590-1604.) There was also testimony by the persons responsible for the Settlement Agreement that they had no intent to restrain trade, which the jury was free to credit. (Tr. 999-1003, 1110-12, 1167-68, 1176-78, 1184-86, 1191-93, 1578-80.)

Although Kahn argues that only unfair or illegal means could have resulted in Motorola's success, there was ample evidence supporting a jury finding that Motorola earned its marketplace status and endorsements competitively. (Tr. 1455-1462, 1466-73, 1488-95, 1507-14, 1543-50, 1591, 1604; Defendants' Exhibits LU, NX, OF.) The Report and Order of the FCC dated November 23, 1993 was introduced into evidence as Plaintiff's Exhibit 2 and states that the Motorola system was "technically acceptable for providing excellent quality AM stereo service at a price that is affordable to both broadcasters and consumers. We disagree with Kahn and other opposing parties that the Motorola system has serious technical deficiencies."

The Court notes that the jury heard testimony that Kahn did not participate in some of the competitions by which AM stereo standards were being chosen. (Tr. 244, 744-45, 1455-59.) The jury also heard testimony that Kahn lost competitions in which he did participate. (Tr. 739-42, 749-51, 757, 1511-14, 1543-45, 1548-50.)

With respect to these antitrust causes of action against Emerson and Motorola, the Court finds that there is a legally sufficient basis for a reasonable jury to have found that the plaintiff failed to prove the existence of a conspiracy to unreasonably restrain trade. The plaintiff's motion for judgment as a matter of law with regard to these causes of

action is denied.

ii. monopolization

The jury found that the plaintiff did not prove, by a preponderance of the evidence, that the defendant Motorola engaged in an unlawful monopoly. Kahn argues that he is entitled to judgement as a matter or law because Motorola wilfully engaged in restrictive or exclusionary acts with the intent to dominate the market and force Kahn out of the market in violation of Section Two of the Sherman Antitrust Act.

As discussed above, the jury heard testimony regarding competitions in which (1) Motorola did and Kahn did not participate, and (2) Kahn's system failed to prevail. Also, the November 23, 1993 FCC Report and Order, entered into evidence as Plaintiff's Exhibit 2, discusses the FCC's review of the Kahn system and the Motorola system and sets forth the reasons supporting its decision to adopt the Motorola system as the national standard. The jury also heard the defendant's expert testify that a single AM stereo system would be the natural result of competition, even without the FCC decision. The FCC acknowledged that a "de facto choice of the market" by Motorola already existed because it was the predominant choice of AM stations that had converted to stereo. (Plaintiff's Exhibit 2.)

The Court finds that the jury's verdict that there was no unlawful monopolization by Motorola is sufficiently supported by the evidence. Accordingly, the plaintiff's motion for judgement as a matter of law as to this cause of action, is denied.

d. patent code violations

The Court granted a motion by Motorola, pursuant to Fed. R. Civ. P. 50(a), with regard to Kahn's claim of patent code violations. Finding that there was an absence of proof of patent code violations or damages and that the plaintiff failed to make out a prima facie case, the Court did not submit that claim to the jury. The Court now adheres to its prior determination.

Conclusion

To be entitled to judgment as a matter of law, the plaintiff would have to establish that there was a complete absence of evidence supporting the jury's verdict or that there was overwhelming evidence in his favor. Based on the record of this trial, he has not made such a showing. The Court holds that each of the jury's findings was amply supported by the evidence introduced at the trial. The only possible ground that the Court would have considered in regard to a post-verdict motion in this case would have been the plaintiff's conduct during the trial. The plaintiff chose not to raise this ground in his post-verdict motion and the Court makes no determination as to the possible merits of his issue.

Based on the foregoing, the Court denies the plaintiff's motion, pursuant to Fed. R. Civ. P. 50(b), for judgment as a matter of law.

The Clerk of the Court is directed to enter judgment in favor of the defendants Emerson Electric Co., Hazeltine Corporation and Motorola, Inc.

SO ORDERED.

Dated: Uniondale, New York
November, 26, 1995

ARTHUR D. SPATT
United States District Judge

Hazeltine
Corporation
Greenlawn, N.Y. 11740-1600 (516) 261-7000

January 29, 1992
Serial XXX-92-GC0117

Motorola, Inc.
1303 East Algonquin Road
Schaumburg, IL 60196

Gentlemen:

The undersigned acknowledges that he has read and is familiar with the provisions of a Settlement Agreement dated February 1, 1992 by and between Motorola, Inc., Emerson Electric Co., ESCO Electronics Corporation, Hazeltine Corporation and Hazeltine Research, Inc. pursuant to which the parties have resolved certain disputes relating to AM Stereo radio.

The undersigned further acknowledges: (1) that he understands that the parties interpret the provisions of Section 3.2 of the Settlement Agreement as prohibiting certain forms of assistance to Leonard Kahn or Kahn Communications, Inc. by the undersigned and other employeees and officers of Hazeltine Corporation not only during normal working hours but at all other times as well, so long as they continue to be employed by Hazeltine Corporation or any of the ESCO Companies; (2) that he fully agrees to conduct himself in a manner consistent with said interpretation of Section 3.2; and (3) that Motorola, Inc. is acting in reliance upon the

commitments set forth in this letter in entering into said Settlement Agreement.

Very truly yours,

s/E A Onders

Edward A. Onders
General Counsel

EAO:ms

H
Hazeltine and the Pursuit of Excellence

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
MAR 12 1997
OFFICE OF THE CLERK

(2)

No. 96 - 1272

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LEONARD R. KAHN,

Petitioner,

v.

EMERSON ELECTRIC COMPANY, HAZELTINE CORPORATION AND MOTOROLA, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS EMERSON ELECTRIC CO., HAZELTINE CORPORATION AND MOTOROLA, INC.

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Dated: March 12, 1997

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No. 96 - 1272

IN THE

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OCTOBER TERM, 1996

LEONARD R. KAHN,

Petitioner,

v.

EMERSON ELECTRIC COMPANY, HAZELTINE CORPORATION AND MOTOROLA, INC.

Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS EMERSON ELECTRIC CO., HAZELTINE CORPORATION AND MOTOROLA, INC.

INTRODUCTION

Respondents, Emerson Electric Co., Hazeltine Corporation, and Motorola, Inc., respectfully pray that this Petition for a Writ of Certiorari be denied.[1] The questions raised by the Petition are not in fact presented by the decision below. The decision below constitutes an application of settled principles to the specific factual situation before the court, and the Federal Circuit reached its decision pursuant to its own properly promulgated rules. This case does not reflect or involve any novel legal or policy decision of general or recurring significance.

[1] The Rule 29.6 information for these parties is provided in Addendum A.

STATEMENT OF THE CASE

The Petition skims by, or flatly misstates, certain aspects of the way the Federal Circuit decided this case and of the facts that are material to the decision below. To the extent that these omissions and errors bear directly on the reasons why this case does not merit review by certiorari, a brief restatement of the case is necessary.

The Federal Circuit Decision

The Petition totally ignores the fact that on June 12, 1996, after the case had been fully briefed for approximately a month, the Federal Circuit issued a Notice of Submission Without Oral Argument (see Addendum B to this Brief). This Notice informed the parties that the case had already been reviewed by the Court of Appeals, which had determined that oral argument was not necessary. The parties were given the opportunity to file supplemental briefs by July 15 to address points that they would have made in oral argument. They were also informed that they could make a further request for oral argument and demonstrate why argument would assist the court.

During July 1996, petitioner Leonard R. Kahn proceeded to make a formal request for oral argument, which was not granted, and to file a supplemental brief "in lieu of oral argument."

Senior Judge Nies thereafter tragically died on August 1, 1996. We do not know whether she was on her way to Court, as Kahn speculates, particularly since she was in Delaware at the time. What we do know, as reflected in the June 12 Notice, is that the court had already determined that the appearance of the case on the calendar for August 1 was a mere formality and that "nothing concerning this case will take place in open court" (Addendum B, at 8a). The court had already reviewed and considered Kahn's appeal. The appeal had

already, in fact or in effect, been "taken under submission" within the meaning of Federal Circuit Rule 47.11 (which is reproduced in Addendum C because Kahn fails to include or even mention it).

There is absolutely no factual basis for the Petition's suggestion that Kahn's pro se status was a factor in the Federal Circuit's treatment of his appeal. Indeed, the Petition reveals on its face that the Federal Circuit has consistently provided Kahn with an oral argument in other appeals when the case merited argument (Pet. 12).

The Decisions by the District Court

The Petition erroneously claims that the district court submitted a question of contract construction to the jury and then abdicated its duty to decide Kahn's post-trial motion under Fed. R. Civ. P. 50(b). The second "Question Presented" rests on a totally nonexistent predicate.

To the contrary, the district court plainly made its own construction of the written agreements in this case. It was on the basis of that construction that the district court only submitted to the jury the issue of breach of an implied covenant of good faith (see App. B-9). In reviewing the post-trial motion, the district court again made its own analysis of the written agreements (App. B-10). Kahn does not agree with the district court's analysis, but that is not a procedural error and in no event merits review by this Court.

The February 1992 Settlement Agreement

Although the Petition completely ignores it, the "Contract" at which Kahn's claims are directed was entitled "Settlement Agreement," and as it expressly recited, it was a settlement of a variety of antitrust, unfair competition and other disputes between Hazeltine and Motorola, Inc. Indeed, at the time the negotiation of the Settlement Agreement began, a

subsidiary of Hazeltine had been named as a defendant in an action brought by Motorola on the heels of the patent infringement action filed by Kahn (see Pet. 5).[2]

The Petition incorrectly paraphrases Section 3.2 of the Settlement Agreement. Contrary to the Petition (Pet. 14), that provision does not commit Hazeltine not to participate in any patent infringement litigation against Motorola. Hazeltine's commitment is limited to certain specific groups of patents; for example, Section 3.2 does not say anything about patent litigation against Motorola based on the various Kahn foreign patents that had been licensed to Hazeltine. As the Petition acknowledges, Hazeltine had long ago -- in 1985 -- decided that it did not want to litigate with Motorola over the only one of Kahn's United States patents that anyone has ever suggested was infringed by Motorola's system, and as soon as Hazeltine made that decision it returned all rights to pursue that infringement (including all rights to the proceeds) to Kahn. Thus the Settlement Agreement merely acknowledges that Hazeltine would not bring unfounded patent litigation.

Neither Section 3.2 nor anything in the Settlement Agreement says that Hazeltine will stop competing commercially with Motorola. In fact, as the district court again noted, there was substantial evidence of continued competitive activities after the execution of the Settlement Agreement (App. B-11).

The Petition also provides an incomplete and misleading account of other relevant terms of the Settlement

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[2] The evidence established that Emerson signed the Settlement Agreement as an accommodation to Hazeltine's parent corporation, and only because Emerson was itself a former owner of Hazeltine. Emerson was not an actual or potential competitor in AM stereo radio; indeed, it had totally abandoned any interest in this field when it spun-off Hazeltine (and other businesses) in 1990.

Agreement. Hazeltine and Motorola both agreed to license their AM stereo radio patents to all comers on fair and reasonable terms. As the district court observed, the Settlement Agreement expressly stated that nothing in it could interfere with Hazeltine's obligations to Kahn, and as the court further noted, there was considerable testimony that Hazeltine and Motorola carefully reviewed those obligations before entering into the settlement and concluded that the Settlement Agreement did not violate Hazeltine's duties to Kahn (App. B-10).

The History and Status of AM Stereo Radio

Finally, the historical evolution and status of AM stereo radio described in the Petition is largely a myth.

The evidence at trial showed that Kahn had failed, and Motorola had succeeded, in the AM stereo marketplace long before the negotiations over the Settlement Agreement began, much less before the settlement was finalized. By 1987, receiver manufacturers had stopped selling multisystem radios (those that could receive both Kahn and Motorola system signals) because of lack of consumer interest -- not because of conduct by Motorola. Significantly, the jury found against Kahn on his claim that Motorola had engaged in monopolization (App. B-14), and Kahn did not raise that issue on appeal (Pet. 2). Not a single Kahn system exciter (the device for transmitting the stereo radio signal) has been sold for stereo use in the United States since 1987. In 1988, the FCC found that "the market appears to be working towards establishing a de facto standard." Although the Kahn system did retain a few dedicated supporters, Kahn's suggestions of some supposed broad "public" support for his system were both not in the record -- as he admits -- and the materials he cites were from early years of AM stereo (see Pet. 17).

In 1992, Congress legislated that the FCC pick a single U.S. AM stereo standard. Approximately one month after the Settlement Agreement was signed (and there was certainly not the slightest evidence that one event caused the other), the Chairman of the FCC testified before Congress that "today there is a de facto AM standard -- the Motorola C-Quam system." He told Congress that "few if any" radio stations were still using the Kahn system.

On October 25, 1993, the FCC issued its Report and Order adopting C-Quam as the exclusive national standard for the United States. 8 FCC Rcd 8216. The FCC found that C-Quam already was the de facto U.S. national standard. The FCC also found that the Motorola system was technically acceptable and reasonably priced. Kahn's claims to the contrary, repeated in the Petition (at 16), were formally rejected by the FCC, and that decision was affirmed by the Court of Appeals for the District of Columbia. See Kahn v. FCC, 52 F.3d 1122 (D.C. Cir. 1995). By virtue of that proceeding, it is and has been illegal to broadcast AM stereo radio in the United States using the Kahn system.

That proceeding, not this case, was the place for Kahn's arguments about the technical merit and public benefit of his system. Whatever the future of AM stereo radio, it was that case, not this one, that was decisive to the industry.[3]

---

[3] It must be noted that, again, there is no factual basis to believe that the FCC decision, much less this case, was affected by what the Petition melodramatically calls "improper industry control of government" (Petition 19-20). Indeed, the evidence at trial showed that Kahn (and Hazeltine) sought unsuccessfully to persuade the FCC and various countries to adopt the Kahn system as an AM stereo radio national standard. They failed; the United States, Australia, Brazil, Canada, South Africa, Mexico and Japan all selected the Motorola system. No country has adopted the Kahn system.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

As demonstrated by the foregoing, the reasons for granting the writ propounded by the Petition depend on a series of mischaracterizations and outright misstatements about the record and proceedings below. The decision below does not present any issue that merits plenary review. It does not create any conflict or decide any unsettled question of law.

Nor does this case involve a subject matter of active, much less exceptional, public interest. The evidence at the trial of this case confirmed that the public simply does not care about AM stereo radio. And the death of a judge with a case in the posture it was in, while sad, is plainly not a frequent or recurring situation.

I. THE ACTION OF THE FEDERAL CIRCUIT IN ALLOWING TWO JUDGES TO DECIDE THE CASE PURSUANT TO ITS PROPERLY PROMULGATED PROCEDURES DOES NOT PRESENT ANY DUE PROCESS ISSUE AND DOES NOT CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The suggestion that the way the Federal Circuit decided Kahn's appeal raises a due process issue is totally insubstantial. Neither the Due Process Clause nor any other constitutional provision creates any constitutional right to an appeal. Abney v. United States, 431 U.S. 651, 656 (1977). The Petition does not and could not identify anything fundamentally unfair or invidious about the Federal Circuit's conduct. See Allen v. Georgia, 166 U.S. 138 (1897).

In fact, Kahn's appeal was handled in a manner completely authorized by the relevant statutes and court rules. It was assigned to a three-judge panel as required by 28 U.S.C. § 46(b) and Federal Circuit Rule 47.2. Contrary to the Petition,

however, those provisions do not require that all three members of the panel participate in the decision. To the contrary, 28 U.S.C. § 46(d) and Federal Circuit Rule 47.11 expressly authorize a quorum consisting of a simple majority of a panel to proceed as the court did and to decide the appeal after Senior Judge Nies' death.

Federal Circuit Rule 47.11 states in pertinent part:

> If a judge of a panel that has heard argument or taken under submission any appeal, petition or motion shall be unable to continue with the consideration of the matter by reason of death, illness, resignation, incapacity, or refusal, the remaining judges will determine the matter if they are in agreement and no remaining judge requests the designation of another judge.

Fed. Cir. R. 47.11 (Addendum C, at 10a). This is what happened here. There was apparently a formal calendar call on August 1, 1996, but the case had already been taken on submission pursuant to the June 12 Notice. Confronted with the death of Senior Judge Nies, the remaining panel members were authorized to decide the case.

As the Petition notes, Congress has stated a desire to preserve the tradition of three-judge appellate panels. But Congress has never altered the long-settled principle embodied in 28 U.S.C. § 46(d) and Federal Circuit Rule 47.11 that a quorum of two judges has the power to decide an appeal. See also Ayrshire Collieries Corp. v. United States, 331 U.S. 132, 138 (1947); United States v. Mills, 317 F.2d 764, 766 (4th Cir. 1963).

That authority was expressly reaffirmed by Congress when it adopted the Federal Courts Improvement Act of 1982:

> The circuit courts could continue to adopt local rules permitting the disposition of an appeal in situations in which one of the three judges dies or becomes disabled and the remaining two agree on the disposition; but in the first instance, all cases would be assigned to [a] panel of at least three judges.

S. Rep. No. 97-275, 97th Cong., 2d Sess., at 9, *reprinted in* 2 U.S.C.C.A.N 11, 19 (1982). Significantly, Congress made no distinction between unavailability occurring before and after submission or oral argument, emphasizing only that the appeal must be assigned "in the first instance" to a panel of three judges.

In this case, application of Rule 47.11 promoted the efficient use of judicial resources. The panel had already reviewed the briefs and was ready to decide the case -- the decision was issued only a week later. Failure to decide the case pursuant to the rule certainly would have resulted in delay. It might have required the assignment of a completely new panel, which would have resulted in the waste of the time invested in the case by the members of the original panel. See United States v. Delia, 925 F.2d 574, 575 (2d Cir. 1991) (Newman, J., chambers opinion).

Respondents would agree that the Federal Circuit's practice might be more clearly reflected if the case had been removed from the August 1 calendar when it was in fact taken under submission. But the substance of what the Federal

Circuit did is "clearly within the scope of the court's discretion" and "[f]or this Court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals." Shenker v. Baltimore & Ohio R.R., 374 U.S. 1, 5 (1963). See generally United States v. MacCollum, 426 U.S. 317, 327 (1976) (deferring to courts of appeals on issue involving "expressions of essentially practical judgment on questions which those courts must confront far more than we do"). As recognized in Murray v. National Broadcasting Co., 35 F.3d 45, 48 (2d Cir. 1994), an overly rigid approach to such a rule would arguably create a conflict with the express statutory authority of two judges to constitute a quorum.

The grant of certiorari in Textile Mills Securities Corp. v. Commissioner, 314 U.S. 326 (1941), does not suggest that this Petition merits review. That case implicated fundamental questions of the status and authority of all the individuals designated by Congress as "circuit judges," whereas this case simply involves the procedures used by the Federal Circuit to exercise an express, unchallengeable statutory power to decide cases by a quorum of a duly assigned panel.

Indeed, Textile Mills reinforces the conclusion that the Federal Circuit has acted properly and that this Petition should not be granted. In Textile Mills, the Court eschewed a strict or literal interpretation of the predecessor of part of 28 U.S.C. § 46 because "any sacrifice of literalness for common sense does no violence to the history" of the statute and "the result reached makes for more effective judicial administration." 314 U.S. at 334-35. The decision below reflects a similar consistency with the legislative history and plainly resulted in effective judicial administration.

II. THERE IS NO ANTITRUST ISSUE THAT MERITS REVIEW.

Kahn's claim that there is an important issue of antitrust law in this case is simply not true. Although Kahn has tried to label the Settlement Agreement as a "per se" violation, there neither is nor could be any authority cited for that characterization. The Settlement Agreement had no effect at all on the United States market, where Kahn -- not Hazeltine -- had controlled the ostensibly relevant Kahn patent since 1985. Moreover, this Agreement, favored by the law because of its character as a settlement, actually contains a pro-competitive patent licensing provision. Unlike FTC v. Superior Trial Lawyers Ass'n, 493 U.S. 411 (1990), the Settlement Agreement increased, rather than constricted, public access to AM stereo. It is not a "naked restraint of trade," and it does not contain any of the limited class of specific restraints that have been identified as "per se" violations. See generally Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 8-10, 19-20 (1979). Nothing about the structure or effect of the Settlement Agreement implicates the "boundaries" between antitrust and patent law.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: March 12, 1997

ADDENDUM

ADDENDUM A

RULE 29.6 INFORMATION

As to Emerson Electric Co., there is no parent company. The subsidiaries that are not wholly owned are:

Aichi-Emerson Electric Co.
Alliance Compressors
Andre Cocard S.A.R.L.
Appleton Electric, S.A. de C.V.
ASI Control Techniques A/B
Asco India limited
Ascomatica S.A. de C.V.
Ascotech, S.A. de C.V.
Astec (BSR) PLC
Astec Europe Ltd.
Atelier de Bobinage de Moteurs Electriques S.a.r.L.
Beijing Rosemount Far East Instrument Co., Ltd.
Bertrand-Polico S.A.
Branson Korea Co., Inc.
Carbide Blast Joints, Inc.
CDP International, Inc.
Clairon Enterprises, Inc.
Clairson, Inc.
Clairson International Corp.
Clairson de Mexico
Componentes Avanzados de Mexico, S.A. de C.V.
Construction Electriques du Nord S.A.
Control Technika Eft
Control Techniques Automation BV
Control Techniques BV
Control Techniques BV/SA
Control Techniques Denmark A/S
Control Techniques East Asia Pte Limited

Control Techniques Elpro Automation Limited
Control Techniques Endustriyel Kontrol Sistemleri Sanayii Ve Ticaret A.S.
Control Techniques Gesmbh
Control Techniques India Limited
Control Techniques SpA
Control Techniques Vietnam Limited
Control Techniques Vues, s.r.o.
Controles Electromecanicos de Mexico
Copeland Corporation Limited
Copeland GmbH
Copeland France S.A.
Copeland Iberica CIB S.A.
Copeland Italia S.a.R.l.
Copeland Refrigeration Europe S.A.
Copeland S.A.
Credo Tool Company
Dinatorque S.A. de C.V.
DML Industrial Products, Inc.
Electric Drives Ltd.
Electric Drives Manufacturing Limited
Emerson Electric Co. Pty. Ltd.
Emerson Electric Company India Private Ltd.
Emerson Electric de Mexico S.A. de C.V.
Emerson Electric SRL
Emerson Electric (Thailand) Limited
Emerson Electric (U.K.) Limited
Establissements J. Michel S.A.
Etablissements Sevenier S.A.
Etablissements Trepeau S.A.
Ets, Belzon & Richardot S.A.R.L.
Everton Engineering (N.I.) Limited
F.G. Wilson L.L.C.
F.G. Wilson Australia PTY Limited
F.G. Wilson (Engineering) Limited

F.G. Wilson Engineering (Dublin) Limited
F.G. Wilson (Engineering) HK Limited
F.G. Wilson Engineering Vertriebs-GmbH
F.G. Wilson Inc.
F.G. Wilson (Proprietary) Limited
F.G. Wilson S.A.
F.G. Wilson Singapore Pte Limited
Filcore, Inc.
Fisco Ltd.
Fisher-Rosemount AG
Fisher-Rosemount A/S
Fisher-Rosemount GesmbH
Fisher-Rosemount Holding AG
Fisher-Rosemount (India) Limited
Fisher-Rosemount Instruments Ltd.
Fisher-Rosemount Instruments Pty. Ltd.
Fisher-Rosemount Japan Co. Ltd.
Fisher-Rosemount Limited
Fisher-Rosemount S.A. de C.V.
Fisher-Xomox (India) Limited
Gerent Limited
Gilmour Enterprises, Inc.
Gilmour Inc.
Gilmour Manufacturing Company
Girard Transmissions S.A.
Hangzhou LiShi Ridge Tool Co. Ltd.
Hocking Holdings Ltd.
Hocking NDT Limited
IMI Kft
Irish Pneumatic Services Ltd.
Joucomatic Controls Pty. Limited
Kirloskar Copeland Ltd.
Krautkramer Japan, Ltd.
La Francaise de Manutention S.A.
Leroy-Somer AB

Leroy-Somer Denmark A/S
Leroy-Somer Elektroantriebe GmbH
Leroy-Somer Elektromotoren GmbH
Leroy-Somer Finland OY
Leroy-Somer Iberica S.A.
Leroy-Somer Italiana S.p.A.
Leroy-Somer Ltd.
Leroy-Somer Maroc S.A.
Leory-Somer Motores E Sistemas Electromecanicos Ltda.
Leroy-Somer Nederland BV
Leroy-Somer Norge A/S
Leroy-Somer N.V.
Leroy-Somer (Pty) Ltd.
Leroy-Somer (SEA) Pte. Ltd.
Leroy-Somer Suisse S.A.
Leroy-Somer S.A.
Lipe-Rollway de Mexico, S.A.
Lipe-Rollway N.V.
Lorraine Services Electrique Electromecanique S.A.R.L
M.I.S. Kerebel Provence S.A.R.L.
M.I.S. Poitouraine S.A.R.L.
M.I.S. Societe Peaucelle D'Installations et Reparatons Electriques S.A.R.L.
MLS Industries Inc.
M.L.S. Holice Spol. s.r.o.
Maintenance Industrielle de Vierzon S.A.
Maintenance Industrie Service S.a.r.L.
Maintenance Industrie Services Rennes S.a.r.L.
Maintenance Industrie Services Rhone-Alpes S.A.R.L
Maintenance Industrie Services Toulouse S.a.r.L.
Marcel Oury S.A.R.L.
Mezierres S.A.

Motadour S.A.
Moteurs Leroy-Somer S.A.
Moteurs Patay S.A.
Motores Reynosa, S.A. de C.V.
Motorvenca-Emerson Motors, C.A.
Navarre Services S.A.R.L.
Nippon Fisher Company Ltd.
Nippon Hocking
Ouest Electro Service S.A.R.L.
Oval Corporation
Pace de Mexico, S.A. de C.V.
Pace Industries of Mexico, L.L.C.
Poteau Moderne du Sud-Ouest S.A.
Precision Connector Designs, Inc.
Primark DML, Inc.
Radiel Bobinage S.A.R.L.
Reluctance Motors Ltd.
Rosemount Instruments (Malaysia) SDN BHD
Rosemount Poland Ltd.
Rosemount Portugal Instrumentos Lta.
Rosemount Shanghai Co. Ltd.
Rosemount Spo
Samsung-Emerson Electric Co. Ltd.
Shanghai Branson Ultrasonics Co., Ltd.
Shenyang Copeland Refrigeration Co., Ltd.
Siliconics (Natal) (Pty) Ltd.
Siliconics (Pty) Ltd.
Societe Anonyme de Mecanique et D'outillage du Vivarais S.A.
Societe Commerciale des Ateliers de Constructions Electriques Dorleans S.A.
Societe Confolentaise de Metalurgie S.A.
Societe de Mechanique et D'Electrotherimie des Pays de L'Adour S.A.
Societe de Reparation de Moteurs (SOREM)

Societe DeReparation Electro-Mecanique S.A.R.L.
Societe Nouvelle Paillet Services S.A.R.L.
Swequipos, S.A.
Switched Reluctance Drives Ltd. (SDRL)
Taiyo Emerson Ltd. Japan
Tata Liebert Limited
Tianjn Fisher Controls Valve Co., Ltd.
Transmisiones de Potencia Emerson S.A. de C.V.
Tsubakimoto Emerson Co.
U.S.E.M. de Mexico S.A. de C.V.
VA Export, Ltd.
VA Holding
VAC Data Management, Inc.
VAC Services LP
Valycontrol, S.A. de C.V.Valmet-Rosemount Inc.
Vermont American American Corporation, Fountain Inn
Vermont American (Australia) Ltd.
Vermont American Canada Inc.
Vermont American Corporation
Vermont Westa Werkzeugbau GmbH
Viet Services S.A.R.L.
Xomox Corporation de Venezuela, C.A.
Xomox (India) Limited
Xomox U.K. Limited
Yorba Linda International Inc.
Zhejiang-Emerson Motor Company Ltd.

As to Hazeltine Corporation, the current parent company is General Electric Company plc, and there are no subsidiaries that are not wholly owned. The Court may wish to note, however, that ESCO Electronics Corporation, a former parent of Hazeltine Corporation, has by contract agreed to indemnify both Emerson and Hazeltine in this action.

As to Motorola, Inc., there is no parent company. The subsidiaries that are not wholly owned are:

CellStar Corporation
Clearnet Communications, Inc.
Excalibur Technologies Corporation
General Magic, Inc.
Interactive Network, Inc.
Interphase Corporation
Network Computing Devices, Inc.
Nextel Communications, Inc.
Racotek, Inc.
Silicon Valley Group
Telular Corporation
Total Access Communications Co. Ltd.
United Communication Industry Public Company Limited
XcellNet, Inc.

ADDENDUM B

United States Court of Appeals for the Federal Circuit

NOTICE OF SUBMISSION WITHOUT ORAL ARGUMENT
96-1149
KAHN V. EMERSON ELECTRIC

A review of this case indicates that oral argument is not required and that the appeal may be decided on the briefs without prejudice to full consideration of the issues. This case will be submitted to a panel of judges of the court on August 1, 1996. Becasue the court has not allotted time for oral argument, nothing concerning this case will take place in open court even though the appeal appears on the court's calendar for that day.

Counsel for both parties, or the petitioner or appellant pro se if not represented by counsel, may file a memorandum presenting reasons why oral argument would assist the court or answers to points in an opposing brief that might otherwise have been presented at oral argument, or both. The memorandum, not to exceed 5 pages, may be typewritten on 8 1/2 by 11 inch paper. An original and six copies of the memorandum should be filed on or before July 15, 1996. If there are any questions regarding this notice, please contact Jackie Adamson, 202/786-6204, for MSPB or Court of Federal Claims appeals, or Scott Petrisko, 202/786-6205, for other appeals.

If a request for oral arguement is made and granted, this appeal, would be scheduled for hearing on the same date that this case is to be submitted to the court, and you will be notified by telephone or mail.

After the appeal has been decided by the panel of judges, you will be sent a copy of the decision by mail. Although appeals are usually decided soon after the submission date, in some instances a longer period is required. In any event, you will be notified promptly.

For the Court,

Francis X. Gindgart
Clerk

June 12, 1996

cc: Leonard R. Kahn
Michael G. Biggers Garrett B. Johnson

ADDENDUM C

United States Court of Appeals
Federal Circuit **Rule 47.11**

Local Rule 47.11 Quorum

A quorum is a simple majority of a 3-judge or 5-judge panel of the court or of the court in banc. If a judge of a panel that has heard argument or taken under submission any appeal, petition or motion shall be unable to continue with the consideration of the matter by reason of death, illness, resignation, incapacity, or recusal, the remaining judges will determine that matter if they are in agreement and no remaining judge requests the designation of another judge. If they are not in agreement or if any remaining judge requests the designation of another judge, the remaining judges will promplty advise the chief judge who shall secure another judge to sit with the panel. The clerk shall advise the parties of the designation, but no further argument will be had or briefs received unless ordered by the court.

Supreme Court, U.S.
FILED
MAR 24 1997
CLERK

(3)

No. 96-1272

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LEONARD R. KAHN,

Petitioner,

v.

EMERSON ELECTRIC COMPANY, HAZELTINE CORPORATION AND MOTOROLA, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF OF PETITIONER

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Rich, My Favorite Things, IDEA, Vol. 35-No. 1, 1994, Franklin Pierce Law Center 5, 6

INTRODUCTION

The Petitioner recognizes that it is easy to fall into the "fatal trap" of arguing irrelevant statements of fact. But, as Judge Spatt stated, A966 this case is "made out essentially by documents." Actually, this appeal is even more document intensive as the Petitioner, in an attempt to avoid a retrial, eschewed factual based arguments and based this appeal on the legal meaning of a few key documents. This now permits the Petitioner to restrict this Reply to relevant matters fully supported by the actual words of documents in record.

QUESTION 1 Antitrust-Patent Boundary Issue Treats Restraint of Competition Based on Patents

This Appeal is based upon the unequivocal wording of the 1992 Contract, A2351. Indeed the first two sections after the "boiler-plate" recitals pretty much makes the case:

"3 Mutual Promises

> ¶3.1 The First Party [Motorola] agrees...to deliver a ... check in the amount of Three Hundred Fifty Thousand ($350,000) Dollars ... to Hazeltine Corporation.
>
> ¶3.2 The Second Party [Hazeltine, Emerson Electric and ESCO Electronics]...will not bring...aid, assist or fund Kahn,...or any other third party in conducting, anywhere in the world, any matter, proceeding, dispute or litigation involving or relating to [infringement by Motorola's AM stereo products..]

Nothing could be clearer, Motorola paid off Hazeltine to destroy the last vestige of AM Stereo system competition by taking away Kahn's economic muscle, thus blocking his

ability to compete. The only real muscle he had was the "right to exclude others" power of patents, a power that Hazeltine had been using prior to 1992 to halt the use of Kahn's Patents to spread the use of Motorola's system.[1] But the 1992 agreement never to sue infringers destroyed Kahn's patents. It is analogous to posting a sign on your lawn; **"TRESPASSERS WILL NOT BE PROSECUTED."**

Finally Hazeltine, true to its 1992 promise in ¶3.2, halted all support of Kahn in the Kahn v. General Motors suit, thus helping to destroy its main remaining domestic and foreign rights it still was obliged to exclusively enforce worldwide. Motorola had thus completed its destruction of the last vestige of competition.

Even if the 1992 Contract formally signed by top officials of all three Defendants did not speak most eloquently for itself, we have the contemporaneous letter from Hazeltine's General Counsel to Motorola (B16 to Petition) proving that ¶ 3.2 also halted Hazeltine's assistance to Kahn in enforcing his 18 U.S. AM Stereo Patents and their 200 foreign counterparts patents against Motorola or General Motors and other Motorola licensees. Indeed, none of Hazeltine's employees could help even at night.

Therefore, even if there wasn't clear requirements for Hazeltine to assist Kahn in the General Motors suit so as to avoid invalidating the U.S. Patent upon these important

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[1]Hazeltine's 1991 Worldwide Licensing Policy was clear: "Licenses would not be available from Hazeltine for any receivers which are not capable of receiving Kahn/Hazeltine system broadcasts, such as those which are capable of receiving only broadcasts that use Motorola's C-Quam AM stereo system." A2391

foreign counterparts depended, Motorola clearly had no right to interfere with Kahn's personal and professional relationships with Hazeltine's engineers and attorneys, especially when such interference was manifestly exercised to maintain Motorola's monopoly.

In Respondents' antitrust section arguing that there is no antitrust issue that merits review, they failed to provide a single citation treating this serious question re the boundary between antitrust and patent law whereat, patents are somehow to be excluded from competition. This is a significant issue and if the present decision is permitted to stand such practice will further discourage privately funded research. Thus, if major industrial players controlling mass production facilities can contract to support a monopoly by agreeing never to enforce patents that may interfere with status quo monopolies, individual inventors will face a new and truly impassable barrier to the entry of their inventions.

QUESTION 2 The Jury Was Tasked To Decide Pure Issues Of Law

This is an amazing situation, a lay jury being asked to decide complex questions of law. The Respondents, on Page 3, could only argue that "The district court only submitted to the jury the breach of implied covenant of good faith..." This is clearly inaccurate. Jury Questions 6 to 10 (A2929) cover "Anti-Trust Cause of Action Against the Defendants Emerson Electric Co. and Motorola, Inc. Alleging a Restraint of Trade." Once again, the record speaks for itself and even the most skillful advocates cannot cover up the record, the Jury was asked to decide the fact free antitrust consequences of a formal contract.

The Respondents also argue that the Trial Judge did

his own analysis. But if he did, he certainly did not share that analysis, but merely discussed the jury's reaction and bolstered its decision by Defendants' expert testimony and Defendants' officers testimony that they really didn't mean to harm Kahn and restrain trade. But self-serving testimony should not be permitted to alter the words of a year long secretly negotiated contract signed by senior legal and business officials of these multi-billion dollar firms.[2]

But the Trial Court, on the basis of documents; the 1992 Contract and the negotiated formal letter, B16, absent material questions of fact should have made his own rulings and never submitted the key Antitrust Count to the Jury. **The only factual question that might have been asked of the jury is: Does AM Stereo constitute a separate relevant market?** That issue was never presented (A2326-33), because none of the Economic Experts disagreed that AM Stereo is such a market, in their "rule of reason" analyses and here there is arguably a per se violation.

QUESTION 3 Supervisory Power Should Be Invoked To Require Compliance With Local Rules

The court below not only failed to follow its own rules, even on quorum, it failed to provide even the appearance of justice in this case that was brought in part to rescue a billion dollar industry that provides an important public service.

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[2]Emerson claims that it signed the 1992 Contract as some sort of "accommodation." But the legal impact of the signing is not altered. Moreover, it also formally agreed never use patents to compete against Motorola in Motorola's monopolized field. Thus, hi-tech Emerson agreed never, for all times, to enforce patents in what was then a multi-billion dollar industry. It is difficult to swallow the story that it did this as a mere courtesy.

Respondents' key argument is tersely stated as follows:

> What we do know, as reflected in the June 12 Notice, is that the court had already determined that the appearance of the case on the calendar for August 1 was a mere formality and that 'nothing concerning this case will take place in open court'...(Page 2)

But Federal Circuit practice makes it clear that the panel that was assigned to deliberate and adjudicate the issues had not been selected until July. Furthermore, Judge Nies would not have been appointed to the final "Special Panel" until later as the panel assigned in July had to first make the decision that it needed her expertise to decide the case.

To call the decision making process that took place on August 1st "a mere formality" and that Judge Nies somehow was involved in this cases determination because nothing would happen in "open court" beclouds the overall process by which submission by brief cases are decided. Furthermore, it ignores the Court's own Judgment wherein it is stated that:

> "Senior Judge Nies took no part in the disposition of this appeal." (Appendix B1)

As Judge Rich of the Federal Circuit, pointed out:

> In a typical month...there is a week of hearing during which a judge sits a minimum of four days, with seven cases assigned per day, four to be argued and three submitted on briefs...so, one month may give a judge responsibility for voting on as many as 28 appeals...After hearing its cases, a panel retires to a conference room where the judges exchange views on

> how each case should be decided, if possible, whether an opinion should be written...and who should write it. These are deemed 'straw votes' and not binding. They may take from 10 to 30 minutes. That is usually the extent of the face-to-face panel conferring.[3] at Page 8

Note that all of the cases, including the ones taken on briefs, are first considered by the deciding panel, (as distinguished from its individual judges), at that conference. Also note the similarity with a jury first directed to deliberate at the end of a trial. As the Respondents on page 9 agree "..the Federal Circuit's practice might be more clearly reflected if the case had been removed from the August l calendar when it was in fact taken under submission." It is petitioner's position that if the panel had followed the letter, and admittedly, the spirit of the law, they would have done just that and hopefully with a third member or a fresh panel would have reached the correct decision, obviating this Petition. But they didn't and for the petitioner's 30 year career to be terminated in this fashion should not be permitted. And, importantly, a clear statement by this Court calling for strict compliance with local rules is of significance to all future parties who feel strongly enough to seek appellate review.

In truth, if any step in the procedure can be identified as a mere formality, it was the June 12th action wherein another group of judges made the decision to deny oral argument. Indeed, when the Appellant is acting pro se it is almost a

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[3]Rich, My Favorite Things, IDEA, Vol. 35-No. 1, 1994 Franklin Pierce Law Center. Also see Chief Judge Markey The First Two Thousand Days. Report of the U.S. Court of Appeals for the Federal Circuit, BNA's Patent, Trademark & Copyright Journal, Vol. 38, pg. 179 (1989)

certainty that oral hearing will be denied. Thus, pro se appellants can expect the form letter that the Respondents reproduced as Addendum B. Please note the second sentence of that letter states:

> this case **will be submitted** to a panel of judges of the court on August 1, 1996.(emphasis added)

Note it did not say it would be submitted on/or before August 1, 1996, it said it will be submitted on August 1st. The result is not of minor consequence. The loss of a third judge in the decision making process is similar to excusing, for no cause, a third of the jury just prior to deliberations.

That the Federal Circuit is not unique in its handling of submissions, Judge Coffin provides a very readable and interesting chapter "A Day in Court" in his detailed discussion of practice at the First Circuit. Footnote 6, infra

Petitioner's Appeal Suffered from Three Types of "Rationing"

In Professor Baker's careful study of appellate court proceedings,[4] he details attempts at increasing efficiency. But he prefaces his study with a quote from Learned Hand:

> If we are to keep our democracy, there must be one commandment: Thou shall not ration justice.

Nevertheless, this single case suffers from three separate steps of rationing justice.

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[4]Baker, Rationing Justice on Appeal, the Problems of the U.S. Courts of Appeals, Justice Research Institute, West, St. Paul, 1994

1. Oral argument was denied even though the appeal involved complex issues of law;

2. The case was submitted to and determined by a two judge panel against clear unambiguous local rules on panels and quorum;[5]

3. The court never issued a single word of explanation why it affirmed the lower court.

Each one of these practices is found to be reprehensible by such scholars as Professor Baker, and combined they certainly transgressed Judge Hand's Commandment.

Of the three "sins," Professor Baker finds the gravest to be the last one. In one of his rare displays of vehement, unequivocal flat-footed thou shall not remarks, he opined that deciding appeals without issuing a written opinion to the parties "deserves to be formally abolished, rather than just being allowed to fall into disuse." (id at 125)

As to the first sin Professor Baker is not nearly as concerned. Indeed, he argues that trivial cases that do not require further elaboration beyond the briefs can and should be denied oral argument, if the court issues an opinion.

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[5]Professor Baker discusses the small efficiency gain of "dyad" over "triad" panels especially since "relatively small proportion of judge time [is] spent on preparing, hearing, and deciding 'easy' appeals." (pg. 173) But not included is the arithmetic showing how effective three judge, rather than two judge panels, are in keeping unusual positions from totally controlling a panel. Assuming a pool of sixteen judges, the probability of getting two non-conformist judges on a two judge panel is 2.5%, whereas the probability of getting three such judges on a three judge panel is only 0.1786%.

Without an opinion and without an oral no appellant can be expected to believe in the entire process. But, in the instant case, given its complexity, surely the appeal court needed oral argument, as Judge Coffin has argued.[6]

The Respondents argue that this due process issue is totally insubstantial and supports this argument by suggesting that there is nothing "fundamentally unfair" about the Federal Circuit's conduct. However, the cumulative effect of all three rationing steps is manifestly unfair.

In any case, the Federal Circuit Rules are clear and should not be bent to terminate these years of litigation without a single word of explanation. The Petitioner does not wish to engage in the arcane questions of due process and "governmental regularity" but the bottom line should be that court's should religiously follow their own rules so that when individuals enter the appellate arena they know that pure accidents will not factor into the destruction of their case.

History of AM Stereo

As to the defendants' "rewrite" of history and status of AM Stereo on page 5, it would take more than 10 pages just to answer. There is one point where the parties concur: "the public simply does not care about AM stereo radio." Page 7 All this proves is the obvious. A system so defective as to cause at least the judge and one juror to find the sound so

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[6]Coffin, On Appeal: Courts, Lawyering and Judging, W.W. Norton & Company, N.Y. 1994. Judge Coffin argues that oral argument is an efficient way to increase the judges' understanding and, critically, eliminate misunderstandings. He uses the term "conversations with the court" to make the procedure's importance crystal clear. id 132-135.

clearly offensive, surely cannot be forced upon the public. The basic battle here is between systems,[7] one that broadcasters know is viable and the other which isn't. The public has spent literally billions of dollars on AM Stereo Radio. (Twenty five million car radios, average price of $800, with no trade in for the original radio.) AM stations have spent millions in equipment. Thus, there is public interest in this matter at least to the extent that this appeal should strictly follow the rules.

CONCLUSION

Petitioner respectfully requests this Honorable Court to remand this appeal to the Federal Circuit for hearing and consideration ab initio by a newly selected three judge panel.

Dated: March 21, 1997

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[7]But the battle plan was not to challenge Motorola's legendary influence of governments, but to use Kahn's patents to obtain injunctive relief. (Hazeltine's 1991 Policy, footnote 1.) Motorola's system's fatal flaw was that it did not work without Kahn's invention. And Hazeltine's trump card was to refuse to license Motorola radios. This was the checkmate situation in 1991, when Motorola initiated its secret negotiations to destroy all of Kahn's patents and end competition. That the public said "no" because of other Motorola stereo defects, is not an antitrust defense. Signing the 1992 contract and mailing Hazeltine's surrender letters to Japan and Britain (A2386-90), agreeing not to use Kahn's patents to interfere with Motorola's monopolization, completed the offense. What damage this did to the public after 1992 is lamentable, but it is IRRELEVANT to this appeal which is based on the 1992 contract that caused all "Second Party" billion dollar firms to restrain competition with Motorola, forever.

Supreme Court, U.S.
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MAR 28 1997
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(4)

No. 96-1272

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LEONARD R. KAHN,

Petitioner,

v.

EMERSON ELECTRIC COMPANY, HAZELTINE CORPORATION AND MOTOROLA, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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3 PP

INTRODUCTION

The Petitioner filed a Reply Brief on March 24, 1997 and he understands that on that same day the Supreme Court granted certiorari in the Baker v. General Motors suit, Petition No. 96-653. The Petitioner first learned of the Supreme Court's Baker grant from an article in the Wall Street Journal of March 25, 1997, page B16, entitled "Justices to Hear Case on GM Settlement."

SIMILARITY OF SETTLEMENT COVENANTS

While the questions raised in the instant case are unrelated to the Baker Question re "full faith and credit," the 1992 "Settlement Agreement" (A2351), required that Hazeltine discontinue providing any assistance to Kahn in any litigation. This included assistance from engineers and lawyers employed by Hazeltine who, prior to 1992, assisted Kahn in the preparation of his patent infringement case against General Motors, Kahn v. General Motors, 88 Civ. 2982. Some of these individuals were also to act as expert engineering witnesses.[1] In the Baker case, Mr. Elwell's settlement agreement also precluded his acting as an expert in possible future litigation.

Actually, the instant case provides a broadening of the issue raised in the Baker case wherein it is argued that:

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[1]In describing the then secret Settlement Agreement (A2351) in Hazeltine's February 3, 1992 letter to Kahn, the General Counsel stated: "Hazeltine, HRi and I (as an employee of Hazeltine) cannot voluntarily aid, assist or fund you or KCI in your pending suit against General Motors..." (Exh. 2 of Complaint) **Please note that only Kahn's own trade secrets were to be involved in the testimony and that none of Motorola's secrets or privileges were at risk.**

> ..wrongdoers with a blueprint for purchasing the silence of potentially vital witnesses, [are] in violation of the ancient maxim that the public has a right to every man's evidence. (Page 11 of Baker Petition)

The purchase of silence in the instant case is even more reprehensible as it was done in specific litigation as part of on-going plan to destroy competition; no accident, plain wilful destruction of competition.

Thus, the instant Petition raises a question beyond whether any agreement to interfere with the obtaining of testimony should be deemed unenforceable as against public policy. It raises the question of whether a firm should be permitted to purchase silence in the perpetration of an illegal act to destroy competition in violation of the Sherman Act. Such acts present a profound threat to the judicial system.

ALTERNATIVE RELIEF REQUESTED

The Petitioner respectfully requests that the Court consolidate hearing of his appeal with Baker and grant certiorari on the basis that his case could provide means for further elaborating the expected teachings of the Baker decision. Alternatively, it is respectfully requested that the Court delay the determination of his Petition until the Baker v General Motors appeal is decided so that it also controls the instant Petition and any instructions the Court may issue in regard to the requested Remand to The Federal Circuit.

Dated: March 27, 1997

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